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In The

Supreme Court of the United States

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT, and HARRISON SAUNDERS,

Petitioners,

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife, and Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment provides substantive protection against arbitrary state interference with private property, or whether a property owner's sole remedy for arbitrary state interference with private property is to seek "just compensation" under the Takings Clause of the Fifth Amendment?

LIST OF PARTIES

The following parties were Plaintiffs at the U.S. District Court and Appellants before the U.S. Court of Appeals for the Ninth Circuit: Harvey and Doris Madison, Charles and Elena d'Autremont, and Harrison Saunders (hereinafter collectively "Montana Landowners"). The following parties were Defendants at the U.S. District Court and Appellees before the U.S. Court of Appeals for the Ninth Circuit: Patrick J. Graham, Director, Montana Department of Fish, Wildlife and Parks; and Stan Meyer, David Simpson, Charles Decker, Darlyne Dascher, and Tim Mulligan, Commissioners, Montana Fish, Wildlife and Parks Commission. The following were Defendants-Intervenors at the U.S. District Court and Appellees-Intervenors before the U.S. Court of Appeals for the Ninth Circuit: Montana Coalition for Stream Access; Montana Wildlife Federation; Montana Chapter of Trout Unlimited; and Fishing Outfitters Association of Montana.

STATEMENT OF RELATED CASES

Petitioners are unaware of any related cases that either are pending review or were reviewed previously by this Court.

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Ninth Circuit, *Madison, et al. v. Graham, et al.*, 316 F.3d 867 (9th Cir. 2002), which was issued on December 23, 2002, and is reproduced at Appendix ("App.") 1-11. The opinion and order of the United States District Court for the District of Montana, *Madison, et al. v. Graham, et al.*, 126 F. Supp.2d 1320 (D. Mont. 2001), appear at App. 12-28.

JURISDICTION

The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are involved in this Petition for *Writ* of *Certiorari*. U.S. Const., amends. V, XIV (App. 29).

STATUTE INVOLVED

The statute involved in this Petition is the Montana Stream Access Law, Mont. Code Ann. §§ 23-2-301, *et seq.* (App. 30-38).

STATEMENT OF THE CASE

On May 31, 2000, Montana Landowners filed their complaint in the United States District Court for the District of Montana challenging the Montana Stream Access Law, Mont. Code Ann. §§ 23-2-301, *et seq.*, as a violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

On August 3, 2000, Defendants filed a Rule 12(b)(6) motion to dismiss. On August 14, 2000, the Montana Wildlife Federation, Montana Chapter of Trout Unlimited, Montana Stream Access Coalition, and Fishing Outfitters Association of Montana (hereinafter collectively "Intervenors") moved to intervene and to file a motion to dismiss, which motion was granted on November 30, 2000, over Montana Landowners' objections.

On January 4, 2001, the District Court granted Defendants' and Intervenors' motions to dismiss, holding that *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*), required the District Court to view Montana Landowners' Fourteenth Amendment substantive due process claim as a Fifth Amendment takings claim. App. 18. Thereafter, recognizing that Montana Landowners had not brought a takings claim, the District Court held that, had they done so, a takings claim would be invalid for failure to exhaust state remedies. App. 18. Furthermore, the District Court characterized the Stream Access Law's interference with Montana Landowners' property as being, on the one hand, "*de minimus*," and, on the other hand, interfering not at all. App. 19-20. The District Court further stated, in *dicta*, that the Stream Access Law substantially advances a legitimate government interest and is not irrational or arbitrary. App. 21. The District

Court then addressed, again in *dicta*, the arguments raised by Intervenors, concluding that Montana Landowners' complaint was barred by the statute of limitations, *res judicata*, the Full Faith and Credit Statute (28 U.S.C. § 1738), and the Rooker-Feldman Doctrine. App. 22-25.

On February 5, 2001, Montana Landowners timely filed their Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. On December 23, 2002, the Ninth Circuit affirmed that portion of the decision of the District Court that relied on the Ninth Circuit's decision in *Armendariz. Madison, et al. v. Graham, et. al.*, 316 F.3d 867 (9th Cir. 2002); App. 1-11. The Ninth Circuit held that its *en banc* ruling in *Armendariz* required that claims alleging governmental interference with property must be brought under the Takings Clause of the Fifth Amendment, rather than the Due Process Clause of the Fourteenth Amendment, because the Takings Clause "provides an explicit textual source of constitutional protection" for private property. App. 9. Accordingly, the Ninth Circuit held that Montana Landowners' substantive due process claim was precluded because "appellants have alleged harms addressed exclusively by the Fifth Amendment's Takings Clause." App. 9. As a result, the Ninth Circuit declined to address any other aspect of the District Court's decision. App. 3.

STATEMENT OF FACTS

Harvey and Doris Madison of Absarokee, Montana; Charles and Elena d'Autremont of Alder, Montana; and Harrison Saunders of Ennis, Montana; are longtime Montana residents. When these Montana Landowners acquired

their property, the law was clear: they owned and paid taxes on the property beneath the non-navigable streams on their land. Thus, under the U.S. Constitution, they had a right to determine who, if anyone, came upon their land. The expression, "Ask before hunting or fishing on private land," was not just a bumper sticker; it was the law. The Montana Stream Access Law changed that. Today, the non-navigable streams on their lands are public thoroughfares that have robbed these Montana Landowners of their privacy, subjected their land to commercial exploitation, and despoiled the pristine beauty of the land they love.

In 1905, Harvey Madison's grandfather, Mathew Madison, homesteaded a 1,000-acre ranch on the Stillwater River in Stillwater County, Montana. Since 1978, the Madisons, Harvey and Doris, have owned the ranch pursuant to inheritance of the Desert Lands homestead patent issued by the United States to Mathew Madison in 1905. Their property encloses approximately one mile of the Stillwater River, which is not, and historically has never been, commercially navigable. App. 4. The Stillwater River flows within approximately 300 yards of the Madison's home and within 50 feet of a barn on their property, near which the Madisons keep cattle and horses. The streambed and banks of the portion of the Stillwater River flowing through the Madisons' property are owned by the Madisons because that portion of the Stillwater River is non-navigable. App. 4. Not only do the Madisons own title to the streambed and banks of the Stillwater River on their property, they pay taxes on those lands.

Charles and Elena d'Autremont maintain a residence in Alder, Montana. Since 1978, the d'Autremonts have owned a 275-acre ranch on the Upper Ruby River in

Madison County, Montana. Their property encloses approximately one and one-half miles of the Ruby River, which is not, and historically has never been, commercially navigable. App. 4. The Ruby River flows within 150 feet of the front door of the d'Autremonts' dwelling on their property. The streambed and banks of the portion of the Ruby River flowing through the d'Autremonts' property are owned by the d'Autremonts because that portion of the Ruby River is non-navigable. App. 4. Not only do the d'Autremonts own title to the streambed and banks of the Ruby River on their property, they pay taxes on those lands. The d'Autremonts purchased their Montana property, after a number of years in the whitewater outfitting business in Wyoming and Utah, because they sought a remote and private place to raise their family. After purchasing their Montana property, the d'Autremonts ejected a steady stream of trespassers for several years and saw a corresponding improvement in the fishing on their property. All of their neighbors followed the same practice, under the belief that since they held title to and paid taxes on the land under the Ruby River, they were entitled to choose who stood on and thus impacted that land.

Since 1876, Harrison Saunders' family has owned and controlled a ranch of approximately 100 acres on O'Dell Creek in Madison County, Montana. Since the 1950s, Mr. Saunders has owned an interest in the ranch and today he retains a life estate in the property, with the remainder deeded to his son and daughters. His property encloses approximately three-quarters of a mile of O'Dell Creek, which is not, and historically has never been, commercially navigable. App. 4. O'Dell Creek flows within one-quarter mile of Mr. Saunders' home on his property. The

streambed and banks of the portion of O'Dell Creek flowing through Mr. Saunders' property are owned by Mr. Saunders because that portion of O'Dell Creek is non-navigable. App. 4. Not only does Mr. Saunders own title to the streambed and banks of O'Dell Creek on his property, he pays taxes on those lands.

The Stream Access Law provides that all surface waters in the state capable of recreational use may be so used by the public without regard to the ownership of the land underlying or adjacent to the waters. Mont. Code Ann. § 23-2-302; App. 32. The Stream Access Law allows recreational use up to the ordinary high-water mark of all non-navigable rivers and streams "capable of recreational use." *Id.*; App. 32. Recreational uses that are permitted include fishing, hunting, swimming, camping, floating, use of motorized watercraft, building fires below the high-water mark, and "related unavoidable or incidental uses." Mont. Code Ann. §§ 23-2-301(10); App. 32. The public is also given the right to "portage" around barriers or obstructions in the water by going above the high-water mark onto private property; portage around natural barriers, such as waterfalls, rocks, and fallen trees, is neither "lawful [n]or unlawful." Mont. Code Ann. § 23-2-311(4); App. 35.

Since the passage of the Stream Access Law, Montana Landowners may neither exclude others from their property nor prevent others from recreating on their property, including near their homes, buildings, and livestock. Montana Landowners have also suffered and continue to suffer, among other harms, disturbance of livestock, garbage left on the property, harassment or interference with Montana Landowners' attempts to use their own property, and urination and other acts of defecation on the

property as a result of the public access permitted by the Stream Access Law. Moreover, stream users build campfires and prepare meals, subjecting Montana Landowners' private property to the risk of forest and grass fires.

In addition, although Montana Landowners may no longer benefit financially from the use of their private property by the public, their neighbors and others can and do benefit financially. As a result of the Stream Access Law, outfitting businesses, including those operated by Intervenors, target high-quality properties and build their businesses on access to and use of Montana Landowners' properties. Thus, the natural beauty, privacy, security, and solitude that were the very reasons Montana Landowners purchased their properties have been spoiled.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS BY THIS COURT.

A. This Court Has Preserved The Constitutional Protection Afforded A Person's Property By Both The Due Process Clause And The Takings Clause.

This Court has maintained a clear distinction between a substantive due process claim and a takings claim. In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987), this Court recognized that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (Emphasis in

original; underlining added.) On the other hand, "the touchstone of [the Fourteenth Amendment's] [D]ue [P]rocess [Clause] is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). That is, the substantive due process guarantee protects against "deliberate decisions of government officials to deprive a person of life, liberty, or *property*," exercised arbitrarily and oppressively. *Collins v. Harker Heights*, 503 U.S. 115, 127 n. 10 (1992) (emphasis added); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

More recently, five Justices of this Court preserved a person's substantive due process claim regarding his property even when he also asserted a takings claim. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537-38 (1998) (plurality opinion); 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *see also, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 754 n. 13 (1999) (Souter, J., concurring in part and dissenting in part).

B. The Ninth Circuit Has Consistently Misinterpreted This Court's Ruling In *Graham v. Connor*.

In *Armendariz*, the Ninth Circuit held that, because the Takings Clause "provides an explicit source of constitutional protection against private takings," the Fifth Amendment is the sole source of relief for an arbitrary interference with property. *Armendariz*, 75 F.3d at 1324. The Ninth Circuit based that holding on this Court's ruling in *Graham v. Connor*, 490 U.S. 386 (1989). *Id.*; *accord*, *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); *Buckles v. King County*, 191 F.3d 1127, 1137-38 (9th

Cir. 1999); *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 982 (9th Cir. 2002). The Ninth Circuit's interpretation of *Graham* is in error.

In *Graham*, a criminal case, the plaintiff, a diabetic, sued seeking to recover damages for injuries allegedly sustained when law enforcement officers used physical force against him during an investigatory stop by alleging violations of his Fourteenth Amendment rights. *Graham*, 490 U.S. at 388. Rejecting lower federal courts' "indiscriminate[ ]" application of substantive due process analysis "to all excessive force claims lodged against law enforcement and prison officials under § 1983, without considering whether the particular application of force might implicate a more specific constitutional right," this Court held that, where a particular constitutional amendment provides an "explicit textual source of constitutional protection" against a particular sort of government behavior, that amendment, rather than the more general substantive due process guarantee, "must be the guide for analyzing these claims." *Graham*, 490 U.S. at 393, 395. However, *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments," thus preserving the protections afforded by the Due Process Clause. *County of Sacramento*, 523 U.S. at 843-44.

This Court has long recognized that claims may arise under either or both the Takings Clause and the Due Process Clause because those constitutional provisions address two different types of governmental conduct. A claim under the Takings Clause assumes the validity of the regulation but seeks just compensation for the property taken, while a substantive due process claim challenges the

validity of the regulation itself. *See United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884) (when an owner demands just compensation, he has accepted the validity of the taking); *City of Monterey*, 526 U.S. at 747 n. 7, 748 (Souter, J., concurring in part and dissenting in part) (a substantive due process claim asserts a "lack of authority. But this is not so in the usual case where damages are sought"; "inverse condemnation enforces payment for the owner's value in property *lawfully* taken" (emphasis added)).

Under the Takings Clause, the denial of just compensation, not the adoption of the regulation, gives rise to the constitutional violation; therefore, a claim seeking just compensation is the remedy. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985); *see also*, *First English*, 482 U.S. at 314 (The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power."). In contrast, the remedy for the adoption of a regulation that constitutes an arbitrary exercise of governmental power in violation of the Due Process Clause of the Fourteenth Amendment "is not 'just compensation,' but invalidation of the regulation." *Id.* at 197.

Thus, since *Graham*, this Court has addressed, concurrently, the merits of both a Takings Clause claim and a Due Process Clause claim with regard to governmental interference with property. *See Concrete Pipe and Products of Calif., Inc. v. Construction Laborers Pension Trust for So. Calif.*, 508 U.S. 602, 636-47 (1993); *see also, College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673-75 (1999) (discussing, post-*Graham*, deprivation of property as a violation of the Due Process Clause of the Fourteenth Amendment). In

fact, this Court specifically rejected the Ninth Circuit's view that a court should look at the "dominant character" of the challenged conduct to determine the applicable constitutional standard:

> [W]e see no basis for doling out constitutional protections in such fashion. Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn.

Soldal v. Cook County, Illinois, 506 U.S. 56, 70 (1992).

Because the Ninth Circuit's decision conflicts with this Court's decisions, this Court should grant this Petition.

II. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS BY OTHER CIRCUITS.

A. The Federal Circuit And The Eleventh Circuit Have Held Specifically That A Person's Property Is Protected By Both The Due Process Clause And The Takings Clause.

The Federal Circuit has held specifically that governmental interference with property rights gives rise to two separate constitutional causes of action:

> [I]f the government has taken property and has done so in a legally improper manner, it has committed two violations of the property-owner's rights. The two separate wrongs give rise to two

> separate causes of action, and the property-owner may elect to sue for just compensation *or to seek relief for the legal improprieties committed in the course of the taking.*

Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363-64 (Fed. Cir. 1998) (emphasis added). In *Del Rio Drilling*, federal oil and gas lessees sued the United States for an alleged taking when U.S. Department of the Interior officials denied drilling permits. *Id.* at 1360. Because there was an issue in the case as to whether the officials had authority to deny the permits, the Federal Circuit held that the plaintiffs could sue either in the Federal Court of Claims to obtain just compensation for a "taking" or in another forum to invalidate wrongful governmental conduct. *Id.* at 1363.

In *Villas of Lake Jackson, Ltd. v. Leon County*, 906 F. Supp. 1509, 1513-1521 (N.D. Fla. 1995), *aff'd*, 121 F.3d 610 (11th Cir. 1997), the district court held that a person properly raises a Due Process Clause claim when he asserts that the regulation that interferes with his property was not implemented for a rational, legitimate purpose, which leads to the invalidation of the regulation. *Id.* at 1515 n. 4. The district court further held that, on the other hand, a Takings Clause claim seeks just compensation only after admitting to the validity of the regulation. *Id.* Furthermore, the "property" protected by the Due Process Clause includes any subsidiary "property right" deprived by arbitrary state action. *Id.* at 1517.

The Eleventh Circuit affirmed the district court's decision, holding that "[a] landowner's vested rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due

process protections under the federal Constitution." *Villas of Lake Jackson*, 121 F.3d at 614.

B. The First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits Recognize That A Person's Property Is Protected By Both The Due Process Clause And The Takings Clause.

Seven Circuits have recognized that a person's property is protected by both the Due Process Clause and the Takings Clause. In *Simi Inv. Co., Inc. v. Harris County, Texas*, 236 F.3d 240, 247 (5th Cir. 2000), the Fifth Circuit held that the property owner's substantive due process claim was not subsumed by its Fifth Amendment takings claim: "Whatever the eventual fate of Simi's claim for compensation, Simi is entitled to use this court's authority to correct the county's continuing non-possessory interference with its land." *Id.* (quoting the district court). Furthermore, in *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000), the Fifth Circuit held that "*Graham* applies if a constitutional claim is covered by a specific constitutional provision, and if a substantive due process claim is not so covered, it is to be analyzed using substantive due process standards;" *Graham* "does not mean [] that the applicability of the more explicit provision preempts due process protections." (Internal quotations omitted; citing *Lewis,* 523 U.S. at 842-44, and *Soldal,* 506 U.S. at 70.)

In *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 769-70 (6th Cir. 2000), the Sixth Circuit specifically declined to follow the Ninth Circuit's reasoning in *Armendariz*, describing the Ninth Circuit's holding in that case but holding that "[i]n addition to a Fifth Amendment

takings claim ... this circuit's precedents permit [the plaintiff] to assert [a] substantive due process [ ] claim[ ] as well." *See also, Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1215 (6th Cir. 1992) (holding that under prevailing Sixth Circuit precedent, "the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication").

In *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834, 835-36 (1st Cir. 1998), the First Circuit, while noting that, based on *Graham*, "the Takings Clause, not substantive due process, would seem to supply the proper decisional framework," nevertheless held that "[our] recognition that substantive restrictions on public power may invalidate land use legislation if, for example, such legislation represents arbitrary or irrational action by lawmakers, comports with modern takings jurisprudence." The First Circuit then addressed the question presented by the plaintiff's claim: "whether the challenged legislation bears a rational connection to a legitimate public purpose." *South County Sand*, 160 F.3d at 836.

In *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 595 (3rd Cir. 1998), the Third Circuit held that "in the context of a land use decision, the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." The Second Circuit, in *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2nd Cir. 1995), recognized that "[s]ubstantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in the constitutional sense." In *Iowa Coal Min. Co. v. Monroe County, Iowa*, 257 F.3d 846, 853 (8th Cir. 2001), the Eighth Circuit addressed, without reference to *Graham*, the merits of a substantive due

process claim in the context of a land-use decision. The Fourth Circuit, in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-71 (4th Cir. 1991), addressed the plaintiff's substantive due process claim on the merits.[1]

The Ninth Circuit's decision conflicts with the decisions of all other Circuits that have addressed this matter.[2] On this, the Ninth Circuit stands alone. This Court should grant this Petition to resolve this well-established and growing conflict.

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[1] The Seventh Circuit expressed doubt regarding, but did not explicitly reject, substantive due process claims in the context of claims relating to property. *Daniels v. Area Plan. Comm'n of Allen County*, 306 F.3d 445, 458 n. 14 (7th Cir. 2002) (citing *Armendariz* for the proposition that a private taking will be analyzed under the Takings Clause, but holding that "plaintiffs may maintain a substantive due process claim to contest land use decisions").

The Tenth Circuit, relying on *Graham*, held that a plaintiff's Fourteenth Amendment Due Process claim was subsumed into the plaintiff's Takings Clause claim but specifically declined to address whether a due process claim would always be subsumed by a takings analysis. *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991). *Cf.*, *Signature Properties Intern. Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1267-68 (10th Cir. 2002) (discussing ripeness of substantive due process claim).

[2] *See John Corp. v. City of Houston*, 214 F.3d 573, 582-83 (5th Cir. 2000), analyzing "the effect of *Graham*" by collecting and discussing cases, mostly from the Ninth Circuit, that have "used *Graham* to support considering a substantive due process claim as invoking the Takings Clause's protections" as well as the decisions from "a majority" of other Circuits that have declined to collapse due process claims into takings claims.

CONCLUSION

For all of the above reasons, this Court should grant this Petition.

Respectfully submitted,

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Dated: March 24, 2003

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY MADISON;
DORIS MADISON;
CHARLES D'AUTREMONT;
ELENA D'AUTREMONT;
HARRISON SAUNDERS,

Plaintiffs-Appellants,

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife & Parks; STATE OF MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; STAN MEYER, Commissioner; DAVID SIMPSON; CHARLES DECKER, Commissioner; DARLYNE DASHER; TIM MULLIGAN, Commissioner,

Defendants-Appellees.

MONTANA COALITION FOR STREAM ACCESS (MCSA); MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED (MTU); FISHING OUTFITTERS ASSOCIATION OF MONTANA (FOAM),

Defendants-Intervenors-Appellees.

No. 01-35145

D.C. No.
CV-00-00018-CCL

OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
November 6, 2002 – Boise, Idaho

(Filed December 23, 2002)

Before: Stephen S. Trott, Thomas G. Nelson and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Trott

COUNSEL

S. Amanda Koehler, Mountain States Legal Foundation, Denver, Colorado, for the appellants.

Brian M. Morris, Soliciter [sic], Montana Department of Justice, Helena, MT, for the defendants-appellees.

James H. Goetz, Bozeman, MT, for the intervenors-appellees.

OPINION

TROTT, Circuit Judge:

Harvey and Doris Madison, Charles and Elena d'Autremont, and Harrison Saunders (collectively "appellants") appeal from the district court's published decision dismissing their complaint with prejudice. The appellants sought to have Montana's Stream Access Law, Mont. Code Ann. §§ 23-2-301, *et seq.*, declared unconstitutional on the grounds that it (1) violated their Fourteenth Amendment

substantive due process rights, and (2) was void for vagueness. The district court held that (1) the appellants' substantive due process claim was in reality a Fifth Amendment takings claim, and (2) the appellants failed to properly challenge the statute on vagueness grounds. Accordingly, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[2]

I

Because this case was dismissed for failure to state a claim, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to the appellants. *Am. Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1120 (9th Cir. 2002). The facts of this case are fully arrayed in the district court's opinion. *See Madison v. Graham,* 126 F. Supp. 2d 1320,

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[1] The district court found several other grounds for dismissal of the substantive due process claim; however, we need not address them because of our disposition of this case.

[2] Defendants contend that the district court lacked jurisdiction under the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). However, none of the plaintiffs in this litigation, save one, were parties to the relevant state proceeding. "The *Rooker-Feldman* doctrine does not bar the exercise of federal court jurisdiction when the federal court litigant was not a party to the state court action." *Southern California Edison Co. v. Lynch,* 307 F.3d 794, 805 (9th Cir. 2002) (citing *Johnson v. De Grandy,* 512 U.S. 997, 1006 (1994)). Thus, neither the district court nor this Court lacks jurisdiction over the claims of those plaintiffs who were not parties to the earlier state action.

1322-23 (D. Mont. 2001). We repeat only the facts necessary to understand the disposition of this case.

In 1985, the Montana Legislature enacted the Montana Stream Access Law. The law provides that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." Mont. Code Ann. § 23-2-302(1). The appellants' properties are crossed by streams which are non-navigable but are capable of recreational use. Under Montana law, the appellants own the streambeds underlying those streams. Mont. Code Ann. §§ 23-2-309, 22-2-322, 70-16-201. The general public uses those streams and streambeds for various recreational purposes, but under the Montana Stream Access Law the appellants are unable to restrict the public's use.

II

STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

III

DISCUSSION

A. Substantive Due Process v. Takings

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The appellants alleged in their complaint that enforcement of the Montana Stream Access Law violates their substantive due process rights by infringing upon their liberty interests and fundamental rights, and they strenuously protest the construction of their complaint as a takings claim.

A close inspection of the complaint, however, reveals that the harms allegedly caused by the Montana Stream Access Law result from the appellants' inability under the law to exclude others from their property.[3] Thus, the issue

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[3] The relevant portions of the complaint allege:

¶ 23. Plaintiffs have suffered and continue to suffer from impaired property values. . . . [T]he recreational value of the property is impaired. For more than 25 years . . . Mr. Saunders and his family leased the right to use the stream and the streambed on his property for $4000 up to $11,500 per year. As a result of the Stream Access Law, Mr. Saunders is no longer able to earn this substantial amount toward his retirement from use of his property by others.

¶ 24. Plaintiffs may not exclude others from their property nor prevent others from recreating on their property near their home, buildings, and livestock. . . .

¶ 25. Plaintiffs have lost the inalienable right to acquire, possess, and protect property. . . .

¶ 26. Plaintiffs have been subject to frequent and repeated trespasses on their properties, which the State is unable to stop or prevent due to the remote nature of the properties. Plaintiffs have also suffered and continue to suffer, among other harms, disturbance of livestock, garbage left on the property, harassment or interference with Plaintiffs' attempts to use their own property, and urination and other acts of defecation on the property. . . .

(Continued on following page)

we address is whether a claim that a statute precludes private property owners from excluding others from their property must be analyzed under the Fifth Amendment's Takings Clause, or whether the analysis falls under the more generalized notions of substantive due process. We hold that the claim falls under the Takings Clause.

The United States Supreme Court has declared that the right of landowners to exclude others from their property represents "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). The appellants recognized this well-established principle in their complaint, stating that "[t]he power to exclude others is the hallmark of a private property interest, an essential component of private property rights."

This court has previously held that claims alleging governmental interference with property rights fall under the Fifth Amendment's Takings Clause. *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) (en banc). Applying the principles announced by the Supreme Court

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In addition, stream users build campfires and prepare meals, subjecting Plaintiffs' private property to the risk of forest and grass fires.

* * *

¶ 29. .... The d'Autremonts' property has been and continues to be the subject of advertisements and profit for a neighboring outfitter. Outfitting businesses and others regularly benefit financially from use of the Madisons' and Mr. Saunders' properties.

in *Graham v. Connor,* 490 U.S. 386 (1989),[4] we held that because the "Takings Clause provides an explicit textual source of constitutional protection against private takings, the Fifth Amendment (as incorporated by the Fourteenth), not the more generalized notion of substantive due process, must be the guide in reviewing the plaintiffs' claim of a private taking." *Armendariz,* 75 F.3d at 1324 (internal quotation marks omitted).

Since deciding *Armendariz,* this court has consistently held that substantive due process claims are precluded where the alleged violation is addressed by the explicit textual provisions of the Fifth Amendment's Takings Clause. *See, e.g., Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978, 983 (9th Cir. 2002) (affirming dismissal of federal substantive due process claim); *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997) (stating that appellants cannot sidestep *Armendariz* by recharacterizing their claim as lying solely in substantive due process).

The appellants contend that because they seek only declaratory and injunctive relief their claim cannot be understood as a takings claim. This contention is without merit. Landowners are allowed to seek such equitable relief in order to resist takings that threaten to violate the Constitution. *See Daniel v. County of Santa Barbara,* 288

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[4] The Supreme Court reviewed an excessive use of force claim against police officers and held that "because the Fourth Amendment provides an explicit textual source of constitutional protection . . . [the Fourth] Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham,* 490 U.S. at 395.

F.3d 375, 384-85 (9th Cir. 2002) (reviewing a takings claim seeking injunctive and declaratory relief).

The appellants contend also that *Armendariz* has no precedential value (1) after the Supreme Court's decision in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), and (2) because *Armendariz* addressed a "private" taking, not a public taking. However, we recently held in *Esplanade Properties,* 307 F.3d at 982-83, a *public* takings case, that *Eastern Enterprises* did not undermine the precedential value of our holding in *Armendariz.* We explained:

> In [*Eastern Enterprises*], a majority of the Court held that the Coal Industry Retiree Health and Benefit Act ("Coal Act"), 26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II), which established a mechanism for providing health benefits to coal industry retirees and their dependents, was unconstitutional. The plaintiff asserted that the Coal Act violated its substantive due process rights and constituted a taking of property in violation of the Fifth Amendment. *Eastern Enters.,* 524 U.S. at 517, 118 S.Ct. 2131. Justice O'Connor, writing for four Justices, held that the Coal Act violated the Takings Clause, but explicitly declined to address "Eastern's due process claim." *Id.* at 538, 118 S.Ct. 2131.
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> [O]f the five Justices constituting the majority, only Justice Kennedy, in concurrence, addressed the due process claim, and he addressed it to the exclusion of the takings claim. The four Justices in dissent decided that the plaintiff had neither a takings claim nor a substantive due process claim. For that reason alone there exists no conflict between the reasoning of the Court in

> *Eastern Enterprises* and our holding in *Armendariz.*

Id. (internal citation omitted).

Because the right to exclude others is a private property right, appellants have alleged harms addressed exclusively by the Fifth Amendment's Takings Clause. Because the "Takings Clause provides an explicit textual source of constitutional protection" of private property rights, "the Fifth Amendment (as incorporated by the Fourteenth), not the more generalized notion of substantive due process, must be the guide in reviewing the plaintiffs' claim." *Armendariz,* 75 F.3d at 1324. However, in light of the appellants' steadfast disclaimer that they do not rely on the Takings Clause as the predicate for this lawsuit, we do not construe their claims as takings claims. This leads to the inevitable conclusion that not only did the appellants fail adequately to allege a substantive due process claim, but also that the district court correctly dismissed their complaint with prejudice.

B. Void-for-Vagueness

The appellants argue that the Montana Stream Access Law is unconstitutionally vague because the state legislature chose to address the legality of portage around *artificial* barriers in the streams but not the legality of portage around *natural* barriers. The district court held that the appellants void-for-vagueness claim failed (1) because a vagueness challenge is not proper when the legislature merely failed to enact a law, and (2) because the appellants "failed to allege in their complaint that there are any natural barriers within their streambeds that cause recreationalists to portage beyond the ordinary

high water mark." *Madison,* 126 F. Supp. 2d at 1327. We address only the second reason.

"It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550 (1975). In ruling on the motion to dismiss, the district court acted within its discretion in refusing to consider facts asserted in an affidavit presented by the appellants.[5] *Isquith v. Middle S. Utils., Inc.,* 847 F.2d 186, 193 n.3 (5th Cir. 1988). The appellants' failure to allege the existence of natural barriers in the streams crossing their property precludes their vagueness claim. Even if they had alleged proper facts, we see nothing vague about the statute. The state legislature simply decided not to address the issue of natural barriers.

CONCLUSION

The appellants alleged facts that give rise only to a takings claim. Their attempt to avoid "takings" analysis by labeling the claim as substantive due process does not change the claim's nature. The right to exclude others from private property is a property right addressed by the Takings Clause of the Fifth Amendment. Under the principles adopted in *Armendariz* and its progeny, the appellants cannot bring a substantive due process claim for the harms they alleged. The appellants likewise have

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[5] The affidavit declared that the bank on one side of the stream was 100 feet tall, but did not allege the existence of any barrier within the streambed.

failed properly to plead the facts necessary to support their void-for-vagueness claim. The district court correctly dismissed the appellants' complaint with prejudice.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

* * *

HARVEY and DORIS MADISON, CHARLES and ELENA D'AUTREMONT, and HARRISON SAUNDERS,

Plaintiffs,

-v-

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife & Parks; MONTANA FISH, WILDLIFE & PARKS COMMISSION; and STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASHER, and TIM MULLIGAN, Commissioners,

Defendants,

MONTANA WILDLIFE FEDERATION, MONTANA CHAPTER OF TROUT UNLIMITED, FISHING OUTFITTERS ASSOCIATION OF MONTANA, and MONTANA COALITION FOR STREAM ACCESS,

Defendant-Intervenors.

CV 00-18-H-CCL

OPINION AND ORDER

(Filed Jan. 4, 2001)

* * *

Before the court are the motions to dismiss filed by the State Defendants and the Defendant-Intervenors. These motions came on regularly for hearing on December 13, 2000. The court heard argument by William Perry Pendley for the Plaintiffs, by Stephen C. Bullock for the State Defendants, and by James H. Goetz for the Defendant-Intervenors. The court, having considered the briefs filed by the parties and the arguments made at hearing, is prepared to rule.

Plaintiffs seek by their Complaint to enjoin the State Defendants permanently from enforcing the Montana Stream Access Law with regard to privately owned streambeds and banks underlying the Stillwater and Ruby Rivers and O'Dell Creek, historically non-navigable waters in the State of Montana.[1] Plaintiffs' First Claim asserts that the Stream Access Law violates their 14th Amendment right to substantive due process. In the alternative, Plaintiffs' assert the same due process claim pursuant to 42 U.S.C. § 1983. Plaintiffs' Second Claim asserts that the Stream Access law violates their right to due process because it is void for vagueness.

The court's analysis of these issues starts with their legal history beginning in 1972 when Montana adopted a new Montana Constitution, which some feared could

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[1] *See* Mont. Code Ann. §§ 23-2-301, et seq. (1999). With certain restrictions, the Montana Stream Access law provides that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." Mont. Code Ann. § 23-2-302(1).

infringe upon rights vested and existing under the prior 1889 Montana Constitution and the substantial body of law decided thereunder.

The 1972 Montana Constitution contained this new and significant provision:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Article IX, Section 3(3).

Then, in 1984, the Montana Supreme Court examined a claim of plaintiff Montana Coalition for Stream Access, Inc. against defendant Dennis Curran, who owned private property bordering some six to seven miles of the Dearborn River and who claimed a right to restrict its use. *Montana Coalition for Stream Access v. Curran,* 682 P.2d 163 (1984). Plaintiff claimed that the Dearborn River is a public way and that the public possesses a right to use the river for recreational uses, up to the high water mark on defendant Curran's private property. Although the Dearborn River had always been considered a navigable river for purposes of federal title analysis, and therefore it was never in doubt that the State of Montana had legal title to the Dearborn's streambed, nevertheless the court proceeded to consider the effect of the new surface water provision of the 1972 Montana Constitution. Relying on the 1972 Montana Constitution and upon the Public Trust Doctrine, the Montana Supreme Court held that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."

Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984).

Several months later, the Montana Supreme Court decided *Montana Coalition for Stream Access v. Hildreth,* 684 P.2d 1088 (Mont. 1984), in which plaintiff challenged defendant Hildreth's attempt to close 1.5 miles of the Beaverhead River to public use. The district court found for plaintiff and declared that the Beaverhead River was subject to public access up to the high water mark of Hildreth's lands. On appeal, the Montana Supreme Court affirmed the district court, citing *Curran* and the surface water provision of the 1972 Montana Constitution, and declared that the public had a right to recreational use of the streambed and banks of the Beaverhead River up to the ordinary high water mark. *Id.* at 1094.

Next, in 1985, after much political compromise, the Montana Legislature enacted the Stream Access Law, Mont. Code Ann. §§ 23-2-301, et seq., for the purpose of codifying Montana law regarding recreational use of Montana streams. The constitutionality of the Stream Access Law was challenged by several property owners (among them one of the Plaintiffs in the instant case, Harrison Saunders) in *Galt v. State, Dept. of Fish, Wildlife & Parks,* 731 P.2d 912 (Mont. 1987) (*"Galt I"*). Although certain minor provisions of the Stream Access Bill were found to be unconstitutional, in the main the Montana Supreme Court found that "the balance of the statutory scheme accords with the Montana Constitution and the opinion of [the] Court." *Id.* at 916. *Galt I* made clear that although property owners might well possess title to the streambeds of streams running through their properties, such a "fee [is] impressed with a dominant estate in favor of the public." *Id.* The Montana Supreme Court therefore

maintained its interpretation of the 1972 Montana Constitution and the Public Trust Doctrine, as earlier stated in *Curran* and *Hildreth,* that the public's right to use state-owned water for recreation imposes a narrowly-confined public easement over the bed and banks of Montana streams owned by private individuals.

Significantly, for purposes of the instant case, the *Galt I* Plaintiffs failed to attempt to appeal this decision to the United States Supreme Court, as they would have done had they desired to challenge the Montana Supreme Court's holding of the constitutionality of the Montana Stream Access Law.

In the instant case, the State Defendants move to dismiss the Plaintiffs' Complaint on the grounds that (1) the Complaint is actually founded in the Takings Clause of the Fifth Amendment, as applied to the states through the 14th Amendment, and this explicit textual source of constitutional authority overrides the claim of substantive due process, (2) under the Fifth Amendment Takings Clause, the test is whether the stream access laws are rationally related to a legitimate state interest and are therefore a valid exercise of police power, (3) even viewed as having a 14th Amendment Substantive Due Process claim, Plaintiffs have failed to carry their burden of showing that there is no conceivable public purpose for Montana's Stream Access laws, and (4) the Montana Stream Access law's failure either to permit or to proscribe portage around natural barriers is not a violation of the vagueness doctrine, and the law's definition of high water

mark is not vague.[2] Thus, the State Defendants assert that there has been no constitutional violation, and Plaintiffs have failed to state a claim upon which relief can be granted.

The Defendant-Intervenors move to dismiss the Complaint on the grounds that (1) Montana's three-year statute of limitations has elapsed, (2) Plaintiffs' claims are barred by res judicata, (3) the Full Faith and Credit statute requires that the court honor a previous adjudication of the constitutionality of Montana's Stream Access Law, and (4) the Rooker-Feldman Doctrine bars federal district court review of Montana Supreme Court cases.

Taking up the State Defendants' motion to dismiss, the court finds that the State Defendants question whether Plaintiffs have properly framed the issues to be decided and assert that the Complaint's First Claim for Relief is really a Fifth Amendment takings claim. The State Defendants suggest that Plaintiffs seek to avoid framing it thus either because Plaintiffs have failed to exhaust their state remedies or because Plaintiffs cannot

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[2] Mont. Code Ann. § 23-2-311(4) provides that "[n]othing contained in this part addresses the issue of natural barriers or portage around said barriers, and nothing contained in this part makes such portage lawful or unlawful."

The "ordinary high water mark" is defined at Mont. Code Ann. § 23-2-301(9) as "the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks."

meet the applicable Fifth Amendment takings claim standard.

Indeed, Ninth Circuit precedent does require that this court view Plaintiffs First Claim as a Fifth Amendment takings claim rather than a 14th Amendment substantive due process claim. *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996) (en banc) (substantive due process claim not actionable when explicit textual protection under takings or just compensation clause of the Fifth Amendment are available, regardless whether a takings claim has merit); *see also Macri v. King County,* 126 F.3d 1125 (9th Cir. 1997) (public takings claim); *Sinclair Oil v. County of Santa Barbara,* 96 F.3d 401 (9th Cir. 1996) (public takings claim). An as-applied Fifth Amendment takings claim would require exhaustion of state remedies, i.e., presentment and denial, prior to being asserted in federal court. *See Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 195 (1985).

The applicable test under the Fifth Amendment Takings Clause would require Plaintiffs to show that Montana's Stream Access Law either does not substantially advance legitimate state interests or denies a property owner all economically viable use of his land. *See Nollan v. California Coastal Commission,* 483 U.S. 825, 834 (1987) (citing *Agins v. Tiburon,* 447 U.S. 255, 260 (1980)). Perplexingly enough, Plaintiffs rely heavily on two Fifth Amendment Takings Clause cases, *Nollan* and *Dolan v. City of Tigard,* 512 U.S. 374, to support their substantive due process argument. *Nollan* is a classic takings case involving the governmental extraction of a public easement across a private beach, whereas in the instant case we are discussing use of a public water resource in ways not necessarily involving any easement over private land

at all. For example, in the case of floaters on Montana streams, there is no public touching of the private streambed but only public use of a public resource. In this example, the private landowner cannot be viewed logically as having any right to exclude a floater from a Montana stream, regardless of the fact that the public water passes over a private streambed. The court acknowledges that not all users of the public resource float on the water, however, but the extent of the touching of the private streambed by a wader, for example, is de minimis and causes no more interference with private property rights than does a floater. Furthermore, the interest and intent of the public is to appropriate and use the surface water, not the private streambed. To the extent that the surface of the water is not subject to appropriation and use by the public, there is no right to the use of the private streambed, since this is an incidental de minimis appurtenance entirely dependent upon use of the surface of the water. These facts are very different from the facts of *Nollan,* where the public desired an easement to walk across a private beach.

Similarly, in *Dolan,* the Supreme Court found that an uncompensated taking had occurred when a shop owner applied for a permit to expand her store and was required, in exchange for the permit, to dedicate a portion of her land for use as a pedestrian path. Because there was no logical relationship between the pedestrian pathway and the expansion of the business, the court applied a heightened scrutiny standard and found that the regulatory action masked an uncompensated taking. *Dolan,* 512 U.S. at 395-96. Unlike the facts in *Dolan,* however, in the instant case no private property right is being extracted from Plaintiffs in exchange for their receipt of a discretionary benefit. In fact, the public has no interest at all in

the private streambed *per se,* but only in the publicly-owned surface waters that traverse the streambed. The cases cited by Plaintiffs, therefore, being "unconstitutional conditions" cases, are distinguishable from the facts presented by Plaintiffs' Complaint.

Yet the State Defendants argue that Montana does have a legitimate state interest in public recreational use of a public resource such as Montana's streams. The State Defendants point out that the Montana Stream Access Law substantially advances a legitimate state interest and does not cause Plaintiffs to lose all economically viable use of their property. Notwithstanding the State Defendants argument that the Stream Access Law is defensible under the Fifth Amendment, the court is mindful of the fact that a Fifth Amendment Takings Claim is not asserted by Plaintiffs' Complaint and is not before this court.

However, even if Plaintiffs correctly frame their First Claim for Relief as a violation of substantive due process, the standard only becomes more demanding. Because Plaintiffs do not assert a fundamental right[3], the statute about which they complain is reviewed under a rational basis standard. *Halverson v. Skagit County,* 42 F.3d 1257, 1262 (9th Cir. 1994). To prevail on this substantive due process claim, Plaintiffs must prove that the statute imposing the property restriction is so irrational and arbitrary that the state could have no conceivable public purpose relating to public health, safety, morals, or

[3] Fundamental rights in the substantive due process context are those that pertain to marriage, family, procreation, and the right to bodily integrity. *See Albright v. Oliver,* 510 U.S. 266, 271 (1994).

general welfare. *Dodd v. Hood River County,* 59 F.3d 852, 864 (9th Cir. 1995). In essence, Plaintiffs must show that Montana could have no rational reason for enacting Montana's Stream Access Law. *See Halverson,* 42 F.3d at 1262. It is not even helpful to Plaintiffs if they could show that the law actually fails to advance its alleged purposes; the legislation need only be *intended* by the legislature to advance a public purpose. *Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 56, 66 (9th Cir. 1994). It is abundantly clear that Plaintiffs cannot show that the Stream Access Law has no public purpose, and in point of fact Plaintiffs have not made any real effort so to do. As counsel for the State Defendants asserted in oral argument, there are numerous, obvious, rational reasons for Montana's Stream Access laws, *viz.,* the public's desire to use Montana's streams for recreation, the promotion of Montana's economy through tourism, and the management of Montana's natural resources and wildlife.

Thus, whether viewed as a Fifth Amendment Takings Claim or as a Fourteenth Amendment Substantive Due Process Claim, it is apparent that Plaintiffs have failed to state a claim upon which relief can be granted, for the reason that Montana's Stream Access Law clearly and substantially advances a legitimate government interest and cannot be said to be irrational or arbitrary, certainly not in the sense of being without any conceivable public purpose. It is even doubtful whether the Stream Access Law results in a taking in the first place, given that it relates primarily to public activities on a public way, i.e., the recreational use of Montana's surface waters.

Moreover, as the Defendant-Intervenors caution, there are several reasons why Plaintiffs' Complaint is not properly placed before this federal district court. For

example, even if Plaintiffs' claims were meritorious, it appears to the court that Plaintiffs have slept on their rights far too long, having missed the three-year general tort limitations deadline by approximately twelve years. *See* Mont. Code Ann. § 27-2-204(1). As noted by the court during oral argument, Plaintiffs had notice of the potential loss of a property interest upon passage of Article IX, Section 3(3) of the 1972 Montana Constitution. In 1985, the Montana legislature relied largely upon the 1972 Montana Constitution to enact the Stream Access Law, Mont. Code Ann. § 23-2-301, et seq. Plaintiffs allowed these two major legal events to pass without challenge, and may not now be heard to complain decades after the fact. Moreover, the statute of limitations bar applies whether Plaintiffs are permitted to go forward with a direct substantive due process claim or the alternative section 1983 action. *Ward v. Caulk,* 650 F.2d 1144 (9th Cir. 1981).

Likewise, the Plaintiffs' argument in favor of a continuing violation exception is without merit. The Plaintiffs allege that passage of the 1985 Stream Access Law violated their constitutional rights, and although Plaintiffs may continue to suffer ill effects from the passage of that law, the legislature has not tolled the statute of limitations by continuing acts. *Id.* at 1147; *see also County Estates Homeowners' Association, Inc. v. McMillan,* 276 Mont. 100, 915 P.2d 806, 808 (Mont. 1996); *see also Kuhnle Brothers, Inc. v. City of Geauga,* 103 F.3d 516 (6th Cir. 1997)

(continuing violation exception applied to liberty claims not property claims).[4]

It is not unfair that Plaintiffs should be precluded from seeking full adjudication of the merits of the Stream Access Law, not only because they have waited overly long, but also because a full adjudication has already been performed by a competent court having proper jurisdiction. Thus, Defendant-Intervenors assert the bar of res judicata based upon the Montana Supreme Court's decision in *Galt v. State, Dept. of Fish, Wildlife & Parks,* 731 P.2d 912 (Mont. 1987) (*Galt I*).

In *Galt I,* a similar group of landowners (including one of the Plaintiffs, Harrison Saunders) did challenge the 1985 Montana Stream Access Law. Their challenge was described by the Montana Supreme Court as follows: The *Galt I* plaintiffs challenged the Montana Stream Access Law "as a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 29 of the Montana Constitution." *Galt v. State, Dept. of Fish, Wildlife & Parks,* 749 P.2d 1089, 1090 (Mont. 1988) ("*Galt II*") (attorney fees phase of *Galt I*). Clearly, the *Galt I* plaintiffs sought an adjudication of their federal constitutional rights as well as their rights under the Montana

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[4] Plaintiffs are uncertain about whether they believe that the right to exclude others is a liberty/privacy interest or a property interest. This question has been answered on numerous occasions, however, by the United States Supreme Court, as in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 433 (1982), which holds that the right to exclude others is 'one of the most essential sticks in the bundle of rights that are commmonly characterized as property.'

Constitution. No *England* reservation [5] was made by the *Galt I* plaintiffs, and therefore Plaintiff Harrison Saunders is barred by res judicata. Plaintiffs Madisons and D'Autremonts are barred by res judicata through the Full Faith and Credit Statute [6] under the theory of virtual representation. *See Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1985) (en banc); *see also Aetna Life & Cas. Inc. Co. v. Johnson*, 673 P.2d 1277 (1984).

Even if this court were not to apply the *res judicata* bar or the statute of limitations bar to Plaintiffs' Complaint, the Plaintiffs would still be precluded from asserting their claims by the Rooker-Feldman Doctrine. By this argument, Defendant-Intervenors assert that Plaintiffs may not seek federal appellate review of the *Galt I* decision in this federal district court. "The Rooker-Feldman doctrine provides that 'federal district courts lack subject matter jurisdiction to review final adjudications of a state's highest court or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3rd Cir.

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[5] *See England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411 (1964).

[6] 28 U.S.C. § 1738 provides in part that "[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." The preclusive effect of a state court judgment is determined by examination of the rendering state's laws. *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992).

1996) (quoting *Blake v. Papadakos,* 953 F.2d 68, 71 (3rd Cir. 1992) (internal citation omitted)). The essence of the Rooker-Feldman doctrine is that federal district courts must not conduct appellate review of a state court decision. The proper federal review of the *Galt I* case could have been performed by the United States Supreme Court, but the *Galt I* plaintiffs did not appeal the Montana Supreme Court's decision. While the *Galt I* decision lacks specificity in its reasoning as to the federal and state constitutional claims, "a paucity of explicit analysis in the court's opinion will not strip the holding of its validity for purposes of Rooker-Feldman's jurisdictional bar." *Gulla v. North Strabane Township,* 146 F.3d 168, 172 (3rd Cir. 1998).[7] After reviewing the major federal and state constitutional challenges to the Stream Access Law, the *Galt I* court found the Law to be constitutional, except for a few provisions. This federal district court cannot now undertake a review of that decision, and adjudication of Plaintiffs' Complaint would effectively require this court to do just that.

The federal Rooker-Feldman doctrine deprives this court of jurisdiction over the Plaintiffs' First Claim for Relief (or alternate First Claim), but even if that were not the case, the First Claim for Relief is barred by the statute of limitations and res judicata.

Plaintiffs' Second Claim for Relief fares no better. On its face, Plaintiffs' Second Claim fails to point to a statute

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[7] In fact, the decision in *Galt I* is similar to that of the lower court in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), in that an overarching decision implicitly denies all of the plaintiffs' claims.

that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). Plaintiffs complain instead that the Stream Access Law fails to state whether or not recreationalists are to be allowed to portage around natural barriers. *See* Mont. Code Ann. § 23-2-311(4). First, this is not a proper constitutional challenge on vagueness grounds because Plaintiffs are really complaining about the legislature's failure to enact a law, and, second, Plaintiffs have failed to allege in their complaint that there are any natural barriers within their streambeds that cause recreationalists to portage beyond the ordinary high water mark.[8] Nor does Plaintiffs' complaint that "ordinary high water mark" is ill-defined persuade the court that the statute is vague. *See* Mont. Code Ann. § 23-2-301(9). The definition is reasonably precise and easily understood.

Accordingly, for all of the reasons described above,

IT IS HEREBY ORDERED that the State Defendant's Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that the Defendant-Intervenors' Motion to Dismiss is GRANTED.

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[8] The court rejects Plaintiffs' attempt to assert facts not in the complaint by affidavit in response to the State's motion to dismiss. However, I pointed out during argument that nothing in the Stream Access Law authorizes floaters to trespass on adjacent lands beyond the high water mark, in the absence of natural barriers in the stream. The State's counsel agreed with the court's observation and remarked that the remedies of the trespass laws were available to Plaintiffs to prevent the claimed wrongs.

IT IS FURTHER ORDERED that Plaintiffs' Complaint is DISMISSED with prejudice. Let judgment enter.

The Clerk is directed to notify the parties forthwith of entry of this order.

Done and dated this 4th day of January, 2001.

/s/ Charles C. Lovell
CHARLES C. LOVELL
Senior United States
District Judge

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

HARVEY and DORIS MADISON, CHARLES and ELENA D'AUTREMONT, and HARRISON SAUNDERS,

Plaintiffs,

V.

PATRICK J. GRAHAM; MONTANA DEPT OF FISH, WILDLIFE & PARKS, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **CV-00-18-H-CCL**

(Filed Jan. 4, 2001)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

State Defendant's Motion to Dismiss having been GRANTED, and Defendant-Intervenors' Motion to Dismiss having been GRANTED,

IT IS ORDERED AND ADJUDGED that Plaintiff's Complaint is DISMISSED with prejudice, that the Plaintiffs take nothing thereby, and that all relief is denied.

January 4, 2001
Date

/s/ **LOU ALEKSICH, JR.**
Clerk

/s/ Dianne E. Mantz
(By) Deputy Clerk

CONSTITUTIONAL PROVISIONS

Amendment V, U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV, U.S. Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

MONTANA ANNOTATED CODE

23-2-301. Definitions. For purposes of this part, the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water.

(2) "Class I waters" means surface waters, other than lakes, that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of April 19, 1985; or

(d) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership.

(3) "Class II waters" means all surface waters that are not class I waters, except lakes.

(4) "Commission" means the fish, wildlife, and parks commission provided for in *2-15-3402*.

(5) "Department" means the department of fish, wildlife, and parks provided for in *2-15-3401*.

(6) "Diverted away from a natural water body" means a diversion of surface water through a manmade water conveyance system, including but not limited to:

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system, excluding the lake, stream, or reservoir from which the system obtains water;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(7) "Lake" means a body of water where the surface water is retained by either natural or artificial means and the natural flow of water is substantially impeded.

(8) "Occupied dwelling" means a building used for a human dwelling at least once a year.

(9) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks.

(10) "Recreational use" means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

(11) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to *23-2-311*(3)(b) is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

(12) "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark.

23-2-302. Recreational use permitted – limitations – exceptions. (1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner:

(a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;

(b) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural watercourse;

(c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access;

(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;

(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;

(f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or

(g) use of a streambed as a right-of-way for any purpose when water is not flowing therein.

(3) The right of the public to make recreational use of class II waters does not include, without permission of the landowner:

(a) big game hunting;

(b) overnight camping;

(c) the placement or creation of any seasonable object; or

(d) other activities which are not primarily water-related pleasure activities as defined in *23-2-301*(10).

(4) The right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter onto or cross private property in order to use such waters for recreational purposes.

(5) The commission shall adopt rules pursuant to *87-1-303*, in the interest of public health, public safety, or the protection of public and private property, governing recreational use of class I and Class II waters. These rules must include the following:

(a) the establishment of procedures by which any person may request an order from the commission:

(i) limiting, restricting, or prohibiting the type, incidence, or extent of recreational use of a surface water; or

(ii) altering limitations, restrictions, or prohibitions on recreational use of surface water imposed by the commission;

(b) provisions requiring the issuance of written findings and a decision whenever a request is made pursuant to the rules adopted under subsection (5)(a); and

(c) a procedure for the identification of streams within class II waters which are not capable of recreational use or are capable of limited recreational use, and a procedure to restrict the recreational use to the actual capacity of the water.

(6) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands.

23-2-303 through 23-2-308 reserved.

23-2-309. Land title unaffected. The provisions of this part and the recreational uses permitted by *23-2-302* do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state.

23-2-310. Lakes. Nothing contained in this part addresses the recreational use of waters of lakes.

23-2-311. Right to portage – establishment of portage route. (1) A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a structure which does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the structure.

(3)(a) A portage route around or over a barrier may be established to avoid damage to the landowner's land and violation of his rights, as well as to provide a reasonable and safe route for the recreational user of the surface waters.

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

(d) Within 45 days of the examination of the site, the supervisors shall make a written finding of the most appropriate portage route.

(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around artificial barriers not owned by the landowner on whose land the portage route will be placed must be borne by the department.

(f) Once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner. The department shall post notices on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means around a barrier.

(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a

member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under *3-15-201*, shall be borne by the contesting party or parties; all other parties shall bear their own costs.

(i) The determination of the arbitration panel may be appealed within 30 days to the district court.

(j) Once a portage route is established, the public shall use the portage route as the exclusive means to portage around or over the barrier.

(4) Nothing contained in this part addresses the issue of natural barriers or portage around said barriers, and nothing contained in this part makes such portage lawful or unlawful.

23-2-312 through 23-2-320 reserved.

23-2-321. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to *23-2-302*, or land while portaging around or over barriers or while portaging or using portage routes, pursuant to *23-2-311*, is owed no duty by a landowner, or his agent, or his tenant other than that provided in subsection (2).

(2) A landowner, his agent, or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) No supervisor or any member of the arbitration panel who participates in a decision regarding the placement of a portage route is liable to any person who is injured or whose property is damaged because of placement or use of the portage route except for an act or omission that constitutes willful and wanton misconduct.

23-2-322. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through:

(a) recreational use of surface waters, including:

(i) the streambeds underlying them;

(ii) the banks up to the ordinary high-water mark; or

(iii) any portage over and around barriers; or

(b) the entering or crossing of private property to reach surface waters.